Filed 3/30/10 In re E.B. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re E. B., a Person Coming Under the Juvenile Court Law.	
MARIN COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. M. R. , Defendant and Appellant.	A125229 (Marin County Super. Ct. No. JV 24666A)

M. R. (father) appeals from an order declaring E. B. to be a dependent of the juvenile court. He contends that there is insufficient evidence to sustain the allegation of the Welfare and Institutions Code[1] section 300 petition that he was negligent in failing to provide adequate nourishment for E. B., and that the Marin County Department of Children and Family Services's (the Department) treatment of him violated the principles of equal protection. We affirm.

I. FACTUAL BACKGROUND

On January 23, 2009, a section 300 petition was filed alleging that parents had negligently failed to provide E. B. with adequate nutrition, resulting in his low weight of 13 pounds 3 ounces at six months of age and a diagnosis of "non-organic Failure to

[1] All further statutory references are to the Welfare and Institutions Code.

Thrive." The Department also filed a request for a protective custody warrant seeking temporary removal of E. B. from his parents' custody. The court granted the request. On January 27, 2009, the court ordered that E. B. be detained and placed in foster care.

The contested jurisdiction hearing was held on March 9 and 17, 2009. The Department recommended that the court sustain the petition based on parents' inability to provide adequate nutrition due to their transient life style; mother's auditory learning difficulty, possible mental health issues, and financial difficulties; and father's shared custody responsibilities for three children from a previous marriage.

Pamela Doerr, the Department's public health nurse, testified that she met with parents and learned that they were mixing E. B.'s formula incorrectly. She also accompanied them to E. B.'s doctor's appointment. She took notes, including detailed instructions on feeding, to assist mother, who has an auditory learning disability and learns better by reading. She subsequently met with mother to go over the instructions and to teach her to mix the formula. She met several times with mother.

Dr. Alicia Susky, E. B.'s pediatrician, testified that parents brought E. B. to see her regularly for his scheduled physicals as well as for emergency department care when they felt he was sick. She also explained that E. B. had a complicated medical history due to his premature birth and his microcephaly, a very small head at birth. She was concerned that his head growth was not on target and that it could result in brain growth issues as well as possible developmental delays. Susky was also concerned about E. B.'s hypertonicity, a condition in which his reflexes in the lower extremities were exaggerated.

Susky noted that on December 30, 2008, E. B. was at the third percentile for his weight indicating that his growth had slowed. On January 21, 2009, Susky ordered two laboratory tests on E. B., one of which suggested that E. B. was not getting as much formula as he needed for his growth. She subsequently diagnosed him with failure to thrive. She testified that caloric intake for infants was especially important for brain development in addition to growth.

Karen Hebert, the Department's social worker assigned to E. B.'s case testified that she was concerned that E. B. was experiencing poor weight gain, and that parents had failed to keep two appointments with the nutritionist or dietitian from Women and Infant and Children Services (WIC). She was also concerned that parents did not know how to properly prepare the formula, and that father was unable to care for E. B. for the entire week as he was committed to being at the paternal grandparents' house four days a week to care for his other three children.[2] She also testified that parents appeared to have a transient lifestyle which did not allow for consistent preparation of E. B.'s food. Because of her concerns and the diagnosis of failure to thrive, the Department filed the section 300 petition. The Department had not worked with father regarding feeding.

Jeanne Gaskin, an early intervention specialist, testified that she worked with E. B. and with his parents on E. B.'s developmental delays. She opined that parents had been present and participatory in the nine sessions that she had conducted thus far. She noted, however, that they were not typical parents in that they needed extra guidance on how to implement certain strategies and activities.

The court sustained the petition, finding that parents negligently failed to provide E. B. with adequate food, and that the court's interests in making sure that he had adequate nutrition brought him within the jurisdiction of the court under section 300. The court also stated that it was required to take jurisdiction based on the evidence of E. B.'s failure to thrive and his low weight at the time of detention. The court urged the Department to work strenuously with parents to teach them to care and feed E. B. so that he could be back in their care as soon as possible.

The court referred the matter for mediation of the disposition issues. The matter was successfully mediated. The parties agreed to out-of-home placement and family reunification services.

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[2] The Department's report for the jurisdictional hearing notes that father has custody of his three children from Thursday night through Sunday night and is required by the Sonoma County Department of Social Services to maintain that custody in the paternal grandparents' home.

II. DISCUSSION

Father contends that there is insufficient evidence to support the juvenile court's finding that he was negligent in failing to provide E. B. with adequate nutrition. He acknowledges that even if we were not to sustain the court's finding as to him, we must uphold the court's jurisdictional finding as mother has not appealed the finding and jurisdiction can be sustained based on her failure to provide E. B. with adequate nutrition. (See *In re Dirk S.* (1993) 14 Cal.App.4th 1037, 1045 [section 300 establishes several bases for dependency jurisdiction, any one of which is sufficient to support jurisdiction].)

In any event, " '[i]n juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.' [Citation.] ' "If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed . . . ." ' " (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Here, there was substantial evidence that father failed to provide E. B. with adequate nutrition. There was evidence that father prepared the formula incorrectly, that he missed two appointments with the WIC nutritionist, and that his transitory lifestyle resulted in it not always being possible for him to prepare E. B.'s food consistently. Moreover, the evidence showed that father typically spent four days of the week with his other children, thus not being available to care for E. B. In sum, there was substantial evidence before the court to sustain the court's jurisdiction finding as to father.[3]

[3] Father suggests that E. B.'s condition could be due to a genetic deficiency. There is no evidence in the record to support father's theory and the issue was not raised below. We cannot consider it for the first time on appeal. (See *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.)

Father also contends that he was denied equal protection in the Department's rendering of its investigation and services, and the determination of jurisdictional issues. We are not persuaded.

Contrary to father's argument, there is no indication in the record that he received disparate treatment by the Department. Rather, the record shows that the Department worked with parents and provided them both with services. While the evidence indicates that Doerr met specifically with mother several times to instruct her on mixing formula, the instruction was tailored to address mother's auditory learning issues. There is no evidence that father was prohibited from attending the meetings or that he required the same teaching methods as mother. The record further reflects that parents lived a transient lifestyle and did not reside together regularly. At the time Doerr was giving mother instructions, E. B. was living in the maternal grandmother's home and mother was the primary caretaker. On this record, we cannot conclude that father received disparate treatment.

III. DISPOSITION

The order is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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REARDON, J.